

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>DONALD BUSCH</b>	)	
Claimant	)	
VS.	)	
	)	
<b>JOHNSON'S GENERAL STORES</b>	)	Docket No. 196,282
Respondent	)	
AND	)	
	)	
<b>FARMLAND MUTUAL INSURANCE COMPANY</b>	)	
Insurance Carrier	)	
AND	)	
	)	
<b>KANSAS WORKERS COMPENSATION FUND</b>	)	

**ORDER**

Claimant appeals the March 13, 2000, Award of Administrative Law Judge Jon L. Frobish. The Award limited claimant to a 15 percent permanent partial general disability, based upon her functional impairment, pursuant to Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). Oral argument before the Board was held on September 8, 2000.

**APPEARANCES**

Claimant appeared by his attorney, Thomas M. Warner, Jr., of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Eric K. Kuhn of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Randall C. Henry of Sterling, Kansas. There were no other appearances.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations contained in the March 13, 2000, Award of the Administrative Law Judge.

**ISSUES**

What is the nature and extent of claimant's injury and/or disability?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

This matter was originally decided by Special Administrative Law Judge Michael T. Harris. In his May 29, 1996, Award, Judge Harris found claimant to be limited to a scheduled injury under K.S.A. 44-510d(22), for the injuries suffered on February 28, 1994. Judge Harris found claimant suffered from a traumatic hernia which would allow him medical treatment and 38 weeks of temporary total disability compensation as a maximum award. That finding by the Special Administrative Law Judge was affirmed by the Board in its November 22, 1996, Order. The matter was then taken to the Kansas Court of Appeals. The Court of Appeals, in its September 18, 1998, decision, found that claimant's Nissen fundoplication had slipped independent of claimant's hernia and that any accompanying and lasting ramifications of that slip would be compensable as a non-scheduled injury. The Court of Appeals then remanded the matter back to the Board for a determination as to the extent of claimant's permanent partial disability as a result of this slipped Nissen fundoplication. In its second Order of December 18, 1998, the Board remanded this matter back to the Director for the purpose of obtaining evidence regarding claimant's post-injury ability to earn wages as it compares to his pre-injury average weekly wage. The Director was further instructed to average that wage-earning loss with the 38 percent task loss found by the Board in its December 18, 1998, opinion and to enter any additional findings that may be required in order to determine claimant's entitlement to a permanent partial general disability.

The matter was remanded to Administrative Law Judge Jon L. Frobish who, in a March 13, 2000, Award, found claimant to be limited to a 15 percent permanent partial general disability, citing Foulk v. Colonial Terrace, *supra*, as justification for denying claimant a work disability. The Administrative Law Judge found claimant should have accepted the job offered by respondent and his failure to do so violated the principles of Foulk, therefore, limiting him to a functional impairment.

On remand, the parties provided substantial additional evidence to both the Administrative Law Judge and the Board for their consideration. Numerous medical and vocational depositions were taken, as well as depositions of claimant and of Jay Johnson, respondent's president. With the additional evidence in the record, the Appeals Board has also been asked to reconsider what, if any, additional task loss claimant has suffered as

a result of the injuries with respondent and the resulting multiple surgeries discussed below.

Claimant suffers from a recurrent hiatal hernia with severe gastroesophageal reflux disorder. Jace W. Hyder, M.D., a physician and surgeon who specializes in abdominal, colon and rectal surgeries, performed a Nissen fundoplication on claimant on July 23, 1991. Claimant ultimately underwent several additional surgeries, including a redo of the Nissen fundoplication in 1994 and ventral hernia repairs in 1995, 1996 and 1999. Postoperatively, claimant was limited to lifting no more than 20 to 30 pounds, with no climbing, stooping or straining. Dr. Hyder testified the follow up surgeries were all consequences of claimant's original surgery.

Both Dr. Hyder and Philip R. Mills, M.D., the court-appointed independent medical examining physician, testified regarding claimant's functional impairment. Dr. Hyder testified claimant had a 10 to 20 percent whole body functional impairment pursuant to the AMA Guides to the Evaluation of Permanent Impairment, which he testified would be a Class II impairment. Dr. Hyder testified he was not certain which edition of the Guides he used to reach this impairment.

Dr. Mills found that claimant's impairment, based upon the AMA Guides, Third Edition (Revised), would be a Class II, 20 percent whole body impairment or, if considering all the related conditions, a Class III, 30 percent whole body impairment. He went on to testify that 50 percent of claimant's impairment was preexisting.

Dr. Mills also testified that claimant would be significantly restricted in his ability to perform jobs. He testified claimant could do a sit-down/desk type job, where all he did was paperwork, answer the telephone, run a cash register and do counter type work, so long as he avoided straining and lifting.

The Administrative Law Judge, in considering the opinion of Dr. Mills, found claimant had a 15 percent whole person functional impairment. The Appeals Board finds the opinion of Dr. Mills to be the most credible and awards claimant a 15 percent whole body impairment.

As stated above, the Appeals Board must also consider what, if any, work disability claimant would be entitled to. At the time of claimant's last testimony, he was unemployed and had been unemployed since leaving respondent on December 31, 1994. There, however, is a dispute in the record between claimant and Jay Johnson, respondent's owner, as to the reason for claimant's departure from respondent's employment.

Claimant testified that he was terminated from his employment and offered no accommodation. Claimant further testified that, while respondent acknowledged the limitations placed upon him by Dr. Hyder, he was, nevertheless, required to do certain job

duties which forced him to exceed Dr. Hyder's restrictions. Mr. Johnson testified that he was always willing to meet the restrictions of Dr. Hyder. He went on to state that it was claimant's own discomfort with his physical limitations which caused the problem. He felt claimant had always been a very independent individual, capable of handling his own jobs. Claimant, however, was having difficulty accepting the fact that he needed assistance in performing a lot of job responsibilities he had heretofore done himself. This reluctance on claimant's part to seek or accept assistance, in Mr. Johnson's opinion, led to claimant's decision to terminate his employment with respondent.

The conflicting testimony between claimant and Mr. Johnson is significant because whether there was an offer of accommodated work within Dr. Hyder's restrictions, and claimant's willingness, or lack thereof, to accept a proffered job, bears directly on claimant's entitlement to a work disability. The Kansas Court of Appeals in Foulk v. Colonial Terrace, *supra*, held that a worker should not be awarded benefits solely for refusing a proffered comparable wage job that the worker had the ability to perform. The testimony of claimant and Mr. Johnson conflict regarding what, if any, accommodations respondent was willing to make. That contradiction, however, was clarified at the time of Mr. Johnson's first deposition on February 14, 1996. At that time, Mr. Johnson stated that respondent could and would accommodate claimant regardless of his limitations. Mr. Johnson testified that claimant's expertise and vast knowledge on how to fix things was vital to respondent's ongoing business activities. He felt claimant was a good employee and was well worth keeping on the payroll, even if all claimant did was answer the phone and instruct people on how to fix things.

This clear, on-the-record offer by Mr. Johnson at the deposition on February 14, 1996, in the Board's opinion, invokes the principles set forth in Foulk. The Appeals Board finds that claimant is limited by Foulk to a functional impairment due to his failure to attempt the comparable wage job offered by Mr. Johnson. However, this limitation would not apply during the period of time before February 14, 1996, when it was unclear whether a definite offer had been made to claimant by respondent. The Appeals Board finds a specific offer of an accommodated job, within claimant's restrictions, was not made until February 14, 1996. Therefore, the Appeals Board finds claimant entitled to a work disability, under K.S.A. 44-510e, before February 14, 1996.

Under K.S.A. 44-510e, the Board must, as the trier of fact, determine the extent, expressed as a percentage, to which the claimant has lost the ability to perform work tasks he performed in any substantial and gainful employment during the 15-year period preceding the accident, averaged together with the difference between the average weekly wage the claimant was earning at the time of the injury and the average weekly wage he is earning after the injury. Claimant was unemployed at the time of regular hearing. The Appeals Board finds claimant had a 100 percent wage loss after December 31, 1994, through February 14, 1996.

In considering what tasks claimant has lost the ability to do, K.S.A. 44-510e mandates that the task loss be "in the opinion of the physician." Dr. Mills, the court-appointed independent medical examining physician, found claimant had a task loss of 77 percent based upon his examination of claimant and a job description prepared by respondent. The Appeals Board finds Dr. Mills' opinion to be credible and adopts same in finding claimant suffered a 77 percent loss of task performing abilities as a result of his injuries suffered with respondent. In comparing both the wage and task loss, the Appeals Board finds claimant has an 88.5 percent permanent partial general disability as a result of the injuries suffered with respondent. This work disability remains through February 14, 1996. Thereafter, pursuant to Foulk, the Appeals Board finds claimant is limited to his functional impairment of 15 percent to the body as a whole.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Jon L. Frobish dated March 13, 2000, should be, and is hereby, modified, and claimant is granted an award against respondent and its insurance carrier and against the Kansas Workers Compensation Fund for injuries suffered on February 28, 1994, for an 88.5 percent permanent partial general disability to the body as a whole through February 14, 1996. Thereafter, claimant is limited to a functional impairment of 15 percent to the body as a whole.

Claimant is entitled to 38 weeks temporary total disability compensation at the rate of \$313 per week totaling \$11,894. Thereafter, and based upon a work disability of 88.5 percent, claimant is entitled to permanent partial disability benefits at the rate of \$313 per week beginning January 1, 1995, through February 14, 1996, a total of 58.57 weeks, totaling \$18,332.41.

Thereafter, claimant is entitled to a 15 percent permanent partial general body disability which allows claimant 58.80 weeks of benefits of which 58.57 weeks have been paid. Claimant is, therefore, entitled to an additional payment of 0.23 weeks of benefits totaling \$71.99, for a total award of \$30,298.40. As of the date of this Order, the entire award would be due and owing and ordered paid in one lump sum minus any amounts previously paid.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the orders contained herein.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November 2000.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

**DISSENT**

I respectfully disagree with the majority's opinion. Although Mr. Johnson's accommodated job offer may have been sincere, it was impractical. Therefore, unlike the majority, I would not reduce claimant's permanent partial general disability to the functional impairment rating commencing February 15, 1996.

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BOARD MEMBER

c: Thomas M. Warner, Jr., Wichita, KS  
Eric K. Kuhn, Wichita, KS  
Randall C. Henry, Sterling, KS  
Jon L. Frobish, Administrative Law Judge  
Philip S. Harness, Director